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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1133

MR. JONES, as natural father and next friend of _____ JONES, or alternatively, _____ SMITH, an unborn child and MR. JONES, individually, *Petitioner*,

v.

MR. SMITH, as natural father and next friend of MISS SMITH, an unmarried minor, MISS SMITH, an unmarried minor, individually and ARTHUR E. COREY, M.D., P.A., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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STATUTES:

Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C., § 1257 (3)

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend I

U.S. Const. Amend IX

U.S. Const. Amend XIV, § 1

MISCELLANEOUS:

Rule 19 (1) (a), Supreme Court Revised Rules (As Amended) (1972)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. _____

MR. JONES, as natural father and next friend of _____ JONES, or alternatively, _____ SMITH, an unborn child and MR. JONES, individually, *Petitioner*,

v.

MR. SMITH, as natural father and next friend of MISS SMITH, an unmarried minor, MISS SMITH, an unmarried minor, individually and ARTHUR E. COREY, M.D., P.A., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

Petitioner, Mr. Jones, by and through his undersigned attorneys, files this his Petition for Writ of Certiorari to the Supreme Court of the United States of America, to review the Judgment of the Fourth District Court of Appeal of the State of Florida in the above entitled case.

Because of the issues and subject matter involved in this litigation and in order to protect the confidentiality of the parties, pseudonyms are used. The parties, however, are real persons.

JURISDICTION

The Respondent, Miss Smith, has already undergone an abortion, pursuant to the Judgment of the Ninth Judicial Circuit Court of the State of Florida as affirmed by the Fourth District Court of Appeal of the

State of Florida. The controversy raised by this case, however, is not moot. This Honorable Court has ruled that questions, timely raised, involving pregnancy do not become moot by termination of pregnancy:

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. . . . But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' . . .
>
> We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that termination of her 1970 pregnancy has not rendered her case moot."
>
> *Roe v. Wade*, ___ U.S. ___, 93 S. Ct. 705, 712-713 (1973).

The Judgment sought to be reviewed was rendered by the Fourth District Court of Appeal of the State of Florida on May 15, 1973, and is filed in Book 11, at page 103, Minute Book of the Fourth District Court of Appeal. This opinion is reported at 278 So. 2d. 339 (4th Dist. Ct. of App. Fla. 1973). The text of said opinion is printed in Appendix A hereto, infra, pages 9-18.

A rehearing was denied by the Fourth District Court of Appeal on May 16, 1973. Petitioner's Motions

for Certification and for Supersedeas Bond were also denied on May 16, 1973. The text of the Order denying said Motions is printed in Appendix B, hereto, infra, page 19.

Appeal was taken within the statutory time to the Florida Supreme Court, which appeal was dismissed on October 24, 1973. The Florida Supreme Court further ordered that no Petition for Rehearing be filed. The text of the Order of Dismissal is printed in Appendix C hereto, infra, page 20.

This Petition for Writ of Certiorari is filed pursuant to the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C., § 1257 (3), which in pertinent part reads as follows:

> "Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> 1. . . .
>
> 2. . . .
>
> 3. By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . ."
>
> 28 U.S.C., § 1257.

QUESTION PRESENTED

Whether a potential putative father who has acknowledged and affirmed his paternal responsibility and duties and who has not abandoned either the potential natural mother or the fetus she carries, has a constitutional right to participate in the abortion decision and to restrain the potential natural mother from terminating a pregnancy resulting from their cohabitation.

CONSTITUTIONAL PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

U.S. Const. Amend I.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const. Amend IX.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend XIV, § 1.

STATEMENT

Mr. Jones, Petitioner herein, and Miss Smith, female Respondent herein, met and began dating several months before the institution of this action. After a while they began dating steadily and continued to so date until shortly before this action was brought. During the period of their dating, they visited each other regularly in their respective apartments, and engaged regularly and frequently in sexual intercourse. Neither Petitioner nor female Respondent used any form of contraception other than the rhythm method. Female Respondent contemplated that she might become pregnant and agreed at one time to a cessation of sexual relations, but at female Respondent's urging, the couple resumed cohabitation. Female Respondent continuously represented to Petitioner that she would marry him, keeping to herself the fact that she did not really want to marry. When female Respondent first suspected she was pregnant, Petitioner offered to pay for a medical examination

of female Respondent, as well as for consultations with other physicians. Petitioner frequently reiterated his desire to see the pregnancy come to term and to assume all the responsibilities associated with childbirth and child rearing that he was biologically capable of assuming. Female Respondent told Petitioner that she was determined to have an abortion. Petitioner sought psychiatric assistance in understanding both his own feelings and the situation in which he found himself. On the basis of psychiatric examinations of the Petitioner, a Board Certified psychiatrist opined to a reasonable medical certainty that Petitioner was sincere and honest and had both a firm and mature commitment in his feelings about his unborn child and that he would be a wise and very fit father. The doctor further observed that Petitioner would suffer severe psychological injury if the pregnancy was aborted and based upon the totality of relevant circumstances regarding the situation presented, he would not advise the female Respondent to have an abortion. There was no testimony adduced at trial showing any possible damage to the female Respondent.

After failing to persuade female Respondent not to have an abortion, Petitioner brought an action to permanently enjoin the Respondents from aborting the pregnancy of the female Respondent, alleging that the Petitioner had a constitutional right to prevent the abortion, and a property right in the unborn child. A copy of the Amended Petition and Oral Amendments is printed in Appendix D hereto, infra, pages 21-24. The trial court directed that the Petitioner present the theory of the case in a supporting memorandum of law, which memorandum of law was filed in support of the Amended Petition and reiterated the constitutional basis for Petitioner's right to prevent the abortion. The trial court's direction is printed in Appendix E, infra, page 25. After granting the Petitioner a temporary injunction, the trial court denied Petitioner a permanent injunction. The Final Judgment is printed in

Appendix F, infra, pages 26-27. After denying Petitioner's Motion for Rehearing, the trial court stayed the execution of the Final Judgment dissolving the temporary injunction, by granting Petitioner a Supersedeas Bond during the time for an appeal to the Fourth District Court of Appeal of the State of Florida. The constitutional questions were again raised in the Assignments of Error to the District Court, which is printed in Appendix G hereto, infra, pages 27-29. The Fourth District Court of Appeal affirmed the Judgment of the trial court, finding that no constitutional right existed in the Petitioner to participate in the abortion decision. The opinion of the Fourth District Court of Appeal is printed in Appendix A hereto, infra, pages 9-18. Petitioner's Motion for Supersedeas Bond pending appeal to the Supreme Court of the State of Florida was denied, as was Petitioner's Motion for Rehearing (See Appendix B, infra, page 19).

Petitioner appealed to the Supreme Court of the State of Florida pursuant to Article V, Section 3(b)(1) of the Florida Constitution (1968), which permits appeals from the District Court of Appeal as a matter of right, when that Court initially passes upon the validity of a State Statute or initially construes a controlling provision of the Florida or Federal Constitution.

Petitioner's appeal to the Florida Supreme Court was dismissed on October 24, 1973, wherein the Court further ordered that no Petition for Rehearing be filed (See Appendix C, infra, page 20).

Petitioner, having exhausted the State remedies permitted under the laws and Constitution of the State of Florida, prays this Honorable Court to issue its writ of certiorari.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be allowed because the case *sub judice* presents a justiciable controversy falling within the criteria of Rule 19(1)(a) of the Supreme Court Revised Rules, printed in Appendix H hereto, infra, page 29.

This Honorable Court has previously addressed itself to the constitutional validity of State abortion statutes, and has recently determined that the right of the mother to be free of State interference in deciding on whether to terminate a pregnancy during the first trimester of the gestation period is superior to the right of the State during that period. *Roe v. Wade*, __ U.S. __, 93 S. Ct. 705 (1973), *Doe v. Boltin*, __ U.S. __, 93 S. Ct. 739 (1973).

The entire thrust of the *Roe* decision and the companion decision of *Doe v. Boltin*, cited *supra*, weighed the mother's right against the right of the State to regulate the health of the mother and to secure its interest in the unborn fetus. The decisions were grounded in the concept that the State during the first twelve weeks of pregnancy has no valid interest in the mother or her pregnancy, and, therefore, any attempt to regulate, prohibit, or in any way interfere with the decision to abort the pregnancy would be regarded as an unjustifiable invasion of the mother's constitutional right of privacy.

The holding in *Roe* was a limited one, granting to the mother a right of privacy vis a vis the State's rights, and then only during the first trimester of the gestation period.

Diligent research has failed to uncover a single case in either the federal jurisdiction or any of the fifty State jurisdictions wherein the issue involved in the case at bar, namely, the potential father's rights versus the potential mother's rights in participating in the abortion decision has ever been litigated.

This Honorable Court has recognized that the father's constitutional rights were not articulated in the recent abortion decisions handed down by this Court:

> "Neither in this opinion nor in *Doe v. Boltin, post*, do we discuss the father's rights, if any exist, in the constitutional context in the abortion decision. No paternal right has been asserted in either of the

cases, and the Texas and the Georgia Statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances . . ."

Roe v. Wade, __ U.S. __, 93 S. Ct. 705, 733 n67 (1973).

The issue presented here, namely whether the potential mother has a superior right both in the fetus and in the abortion decision is a critical issue, particularly when measured in the context of modern social philosophy and recent court decisions recognizing the equality of men and women in society and in the family. The allowance of the writ of certiorari in the case at bar would give this Honorable Court an opportunity to both refine and explain its prior decisions concerning abortions. The issue framed in the lower courts and presented here affords this Honorable Court an opportunity to define the legal underpinnings for the social roles called upon by men and women to play in modern American society.

CONCLUSION

For the above reasons, it is respectfully submitted that the writ of certiorari in the case at bar be allowed.

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January 15, 1974 Counsel for the Petitioner

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1973

MR. JONES,
Appellant,
v. CASE NO. 73-560.

MR. SMITH, etc., et al.,
Appellees.

Opinion filed May 15, 1973.

Appeal from the Circuit Court for Orange County; William C. Gridley, Judge.

Chandler R. Muller and Melvin Pearlman of Mairs Wood Muller & Boroughs, Winter Park, for appellant.

Donald R. Corbett and Gladstone L. Kohloss, Orlando, for appellees.

MAGER, J.

This is an appeal from an order denying a claim for injunctive relief seeking to restrain the "obtaining or aiding in the obtaining of an abortion." Although pseudonyms are used the parties are real persons.

The primary question presented is whether a potential putative father has the right to restrain the natural mother from terminating a pregnancy resulting from their cohabitation. The appellant, who acknowledges that he is the father of the unborn child, is twenty-

seven years old, was formerly married and is the father of a six-year-old daughter by such previous marriage. The appellee-mother is nineteen years old and unmarried and had been dating the appellant for approximately six months during which time the parties were frequently intimate. The appellant in seeking injunctive relief has indicated his desire to marry the appellee and to assume all the obligations financial and otherwise for the care and support of the unborn child; that, notwithstanding such affirmations, the appellee-mother, who has expressed her desire not to marry the appellant, has sought to terminate the pregnancy.

Although the appellant alleged in his complaint below "that the mother's mental and physical health will not be endangered by bringing the child to term in allowing its natural birth" there is no allegation and proof that the proposed termination of pregnancy does not comply with Florida's newly enacted "Termination of Pregnancy" law (Chapter 72-196, Laws of Florida, numbered as Section 458.22, Florida Statutes). It is interesting to note a suggestion by the appellant that his own health would be affected if the pregnancy is terminated; testimony from a psychiatrist examining appellant suggested "the possibility of him suffering depressing symptoms and depressive reactions in the future."[1]

The main thrust of the appellant's position is that as a potential putative father he has the "right" to participate in the decision to terminate the pregnancy.

Because of the time factors involved and in particular the fact that the mother is reaching the end of the first trimester of pregnancy this court has granted an emergency hearing and has expedited its review.

The question presented to this court is a matter of first impression in this state and as best as our research

[1] The psychiatric testimony, however, further suggested that the effect upon the appellant would not prevent him from future marriage or having children.

can determine is a matter of first impression in the nation. While the lack of readily available precedent presents some difficulty we, nevertheless, feel that the expressions and observations made by the courts of this state and the Supreme Court of the United States persuasively point to a resolution of the question in favor of the mother. Roe v. Wade, 93 S. Ct. 705 (1973) and Doe v. Bolton, 93 S. Ct. 739 (1973).

The recent decisions of the United States Supreme Court in Roe v. Wade, supra, and Doe v. Bolton, supra, while dealing with the constitutionality of statutes, set forth what we perceive to be the essential and underlying factor in the determination of this appeal. That factor is the "right of privacy" of the mother. As was observed in Roe v. Wade, the Supreme Court of the United States speaking through Mr. Justice Blackmun, stated:

> "This *right of privacy*, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, *is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.* The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed mother-

hood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." (Emphasis added.)

The opinion continues to point out that while the right of personal privacy includes the termination of pregnancy decision "that right is not unqualified and must be considered against important state interests in regulation." The interest of the state in regulating the termination of pregnancies is predicated upon the preservation and protection of the health of the pregnant woman and in the protection of the potentiality of human life. Chapter 72-196 reflects Florida's interest in regulating terminations of pregnancy. We make these observations with regard to the interest of the state, fully recognizing that we are here dealing with the interest of a potential putative father, for the reason that any interest that a natural father may have, whether married or unmarried, would certainly be subservient to the health of the pregnant woman and the potentiality of human life.

But irrespective of the motivation for the state's interest in the enactment of a termination of pregnancy statute the Supreme Court of the United States has very significantly held that "for the stage prior to approximately the end of the first trimester, the abortion decision and its affectuation *must be left to the medical judgment of the pregnant woman's attending physician* . . .". The attending physician, in consultation with his patient, is free to determine, *without regulation by the state*, that in his medical judgment the patient's pregnancy should be terminated. The initial decision to terminate a pregnancy, then, is one that is *purely personal to the mother* and between her and the attending physician, and any unreasonable governmental interference must yield to the mother's right of privacy.

An examination of the Florida abortion statute reveals that apart from the medical reasons for the termination of pregnancy, the only other factors that would qualify the individuality of the mother's decision to ter-

minate would be the consent of the *husband or parents*, etc. In this regard Section 3 of Chapter 72-196 provides:

> "Section 3. *Written requests required*
>
> "One of the following shall be obtained by the psysician prior to terminating a pregnancy:
>
> (1) The written request of the pregnant woman and the written consent of *her husband, if she is married, unless the husband is voluntarily living apart from the wife*, or
>
> (2) If the pregnant woman is under eighteen (18) years of age *and unmarried*, in addition to her written request, *the written consent of a parent*, custodian, or legal guardian must be obtained, . . ." (Emphasis added.)[2]

It is to be noted from the foregoing that a married woman *need not* obtain the written consent of her husband if "the husband is voluntarily living apart from the wife."

The situation in the case under consideration involves neither a married woman nor a "husband." Moreover, the "consent" of a potential putative father is not included within nor is it required by the terms of the termination of pregnancy law. Therefore, if we were to resolve this question solely on the basis of the applicability of the Florida statute, the appellant would simply have no basis to claim his consent was necessary.[3]

---

[2] Subsection (2) is not applicable since appellee is over the age of eighteen. It is doubtful whether any of the provisions of Chapter 72-196 are applicable in light of the fact that the appellee is not a married woman and more particularly in light of the decision in Roe v. Wade, supra.

[3] Although legislative enactments are presumed to be valid and the requirement for the consent of a "husband" is constitutional whatever may be contended with respect to the invalidity of a distinction between "husband" or putative father, such contention would simply be immaterial. This is so because the U.S. Supreme Court in Roe v. Wade, supra, has decided that during the first trimester the decision to terminate "must be left to the medical judgment of the pregnant woman's attending physician."

As indicated the underlying basis for recognizing a woman's right to terminate her pregnancy during the first trimester is the right of privacy; that right of privacy remains constant except as qualified by the interest of the state *subsequent* to the first trimester. (Roe v. Wade, supra.) The right of privacy is a right that is purely *personal* to the individual asserting such right. Cf. Santiesteban v. Goodyear Tire & Rubber Company, 5 Cir. 1962, 306 F.2d 9. In Babbitz v. McCann U.S.D.C.E.D. Wisc. 1970, 310 F. Supp. 293, 299, the Court observed:

> "As long ago as 1891, in Union Pacific Railway Co v. Botsford, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001, 35 L.Ed. 734 (1891), the court said:
>
> > '*No right is held more sacred*, or is more carefully guarded, by the common law, *than the right of every individual to the possession and control of his own person*, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity to be let alone." ' " (Emphasis added.)

See also specially concurring opinion of Mr. Justice Ervin in Walsingham v. State, Fla.1971, 250 So.2d 857; and Young Women's Christian Ass'n of Princeton, N. J. v. Kugler, U.S.D.C.N.J.1971, 342 F. Supp. 1048.

The appellant contends that whatever right of privacy that the mother might have enjoyed, such right was "waived" by virtue of her consent to and participation in the sex act. This argument is somewhat tenuous. The right of privacy of the mother with respect to a termination of pregnancy as delineated by the decisions of the United States Supreme Court is a right separate and apart from any act of conception. The determination of whether to carry the child the full term is not

"controlled" or "waived" by virtue of the act of conception no more so than the fact that were the child conceived in the State of Florida would give the State the right to interfere with the termination of pregnancy during the first trimester. Moreover, whatever purported "waiver" might have occurred as a result of the conception, the interest or "right" of the natural father must remain subservient to "the life or health of the female" (see Section 458.22(2)(a), F.S.).[4]

If, as the appellant alleges, the right of privacy has been "waived" could it not be asserted that in the case where "pregnancy resulted from rape or incest" (see Section 458.22(2)(c)) the mother of the unborn child would be precluded from terminating the pregnancy absent the participation in such decision by the potential putative father. We make reference to this illustration to in no way deprecate from the sincerity of appellant's claim or the seriousness of the proposition before this court but merely to illustrate more poignantly the proposition that the decision to terminate pregnancy predicated upon the right of privacy is not vitiated by participation in the sex act.

Appellant further contends, apart from the question of the "right to privacy" that the termination of a pregnancy illustrates and reflects the "unfitness of the mother" or "the abandonment" of the unborn child. All jurisdictions recognize that as between the natural mother and putative father, the mother of an illegitimate child has the legal right to its custody, care and control superior to the right of the putative father, *unless the mother is proved to be an unfit person.* In the Interest of R. L. G., Fla. App. 1973, 274 So. 2d 4. Appellant's contentions are equally tenuous and as a practical matter overlook the decisions of the United States Su-

[4] Except for the bare allegation that the "mother's mental or physical health will not be endangered" appellant has failed to carry the burden of demonstrating the continuation of pregnancy would not "substantially impair the life or health of the female" as hereinabove set forth.

preme Court and the statutory enactments authorizing the termination of pregnancies. The questions of fitness or abandonment would seem to be arguments akin to questions of morality which have been laid to rest by the pronouncements of the United States Supreme Court and the Florida legislature. Moreover, whatever questions of fitness or abandonment that would somehow survive the judicial and legislative pronouncements they must yield to the paramount considerations of the preservation and protection of maternal health. We cannot conclude that a mother's decision to terminate a pregnancy gives rise to questions of "unfitness" or "abandonment."

As a further basis upon which to support his "right" to participate in the decision to terminate the pregnancy, appellant suggests the existence of an implied contract between himself and the mother — such contract being evidenced by appellant's agreement to support the unborn child if appellee were to become pregnant coupled with appellee's conduct in engaging in intimate relationships without contraceptive devices and appellee's representations that she would marry appellant.[5] This contention is patently without merit. Under the provisions of Chapter 742, Laws of Florida, appellant having acknowledged paternity, he would by *law* be required to furnish such support. Even an absence of statute the putative father could be required to provide for, maintain or support his illegitimate child. See annotation 20 A.L.R.3d 500. Any "consideration" for such a contract is simply nonexistent. Whether the appellant was required by law to provide support or whether as a moral obligation he undertook to do so does not serve as a basis upon which to establish a "contractual agreement" of such legal and enforceable significance as to prevent a termination of pregnancy otherwise permissible.

[5] The evidence shows that the appellant did not use contraceptive devices with those women with whom he had an intimate relationship prior to the circumstance herein.

This court is familiar with and has examined the various treatises and cases dealing with the expanding rights of unwed fathers; we are, however, unable to conclude that such expansion is sufficiently broad so as to embrace any right to prevent termination of pregnancy.

If we were to conclude that a putative father has the standing to *prevent* the natural mother from terminating the pregnancy would the putative father have the corresponding standing to *compel* the termination of the pregnancy notwithstanding the mother-physician relationship or the considerations imposed by the state? Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous. It is unquestioned that a woman has a fundamental right to determine whether or not *to bear a child*, see Young Women's Christian Ass'n of Princeton, N. J. v. Kugler, supra, and it would be beyond the province of logic and reason to suggest that she could be *compelled* to procreate.

We conclude, therefore, that based upon the rationale of the decisions in Roe v. Wade, supra, and Doe v. Bolton, supra, and F. S. 458.22, that the decision to terminate a pregnancy is a personal decision to be made by the mother and her attending physician.[6]

Concluding as we do we would be careful to point out that this decision should not be interpreted as passing upon any aspect of the propriety vel non of the termination of pregnancies nor should this opinion be construed as authorizing the termination of pregnancy

[6] For this court to restrain the natural mother from terminating her pregnancy during the first trimester would be tantamount to the type of state interference or infringement proscribed by Roe v. Wade, supra.

on demand without regard to the applicable criteria. Our decision is based upon our interpretation of the decisions of the Supreme Court of the United States and Florida Statute 458.22 as they relate to the right of a potential putative father to enjoin the natural mother from terminating her pregnancy. No such "right" exists.

The judgment below is AFFIRMED.

WALDEN and CROSS, JJ., concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1973

MR. JONES

_____,

Appellant

v. CASE NO. 73-560

MR. SMITH, etc., et al.

_____,

Appellee

MAY 16, 1973

ORDERED Appellant's Motion for Rehearing filed May 15, 1973, is hereby denied, and further,

ORDERED Appellant's Motion for Certification filed May 15, 1973 is hereby denied, and further,

ORDERED Appellant's Motion for Supersedeas filed May 15, 1973 is hereby denied.

A TRUE COPY
EMMETT J. COMISKEY
CLERK

cc: Mairs Wood Muller & Boroughs
Donald R. Corbett, Esq.
Gladstone L. Kohloss, Esq.
Hon. Randall P. Kirkland, Clerk
(Case No. 73-2770)

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1973
WEDNESDAY, OCTOBER 24, 1973

MR. JONES, as natural father
and next friend of _____
JONES, or alternatively,
_____ SMITH, an unborn
child and MR. JONES, individually,
Appellant,

vs.

CASE NO.
43955

MR. SMITH, as natural father
and next friend of MISS SMITH
an unmarried minor, MISS SMITH,
an unmarried minor, individually
and ARTHUR E. COREY, M.D., P.A.,
Appellees.

It appearing to the Court that it is without jurisdiction, it is ordered that this cause be and the same is hereby dismissed, and it is further

ORDERED that no petition for rehearing shall be filed in this cause.

A TRUE COPY
TEST:
SID J. WHITE
CLERK, SUPREME COURT.
By: KAY D. YERT

cc: Hon. E. J. Comiskey, Clerk
Hon. Randall P. Kirkland, Clerk
Hon. William C. Gridley, Judge
Mairs, Wood, Muller & Boroughs
(Hon. Chandler R. Muller
Hon. Melvin Pearlman)
Hon. Gladstone L. Kohloss
Hon. Donald R. Corbett

ATTEST:

APPENDIX D

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA.

IN RE:

MR. JONES, as natural father
and next friend of _____
JONES, or alternatively,
_____ SMITH, an unborn
child and MR. JONES, individually,
Petitioners,

vs.

CASE NO.
73-2770

MR. SMITH, as natural father
and next friend of MISS SMITH
an unmarried minor, MISS SMITH,
an unmarried minor, individually
and ARTHUR E. COREY, M.D., P.A.,
Respondents.

AMENDED
PETITION FOR TEMPORARY AND
PERMANENT INJUNCTION

The Petitioner, Mr. Jones, as natural father and next friend of _____ Jones, or alternatively, _____ Smith, an unborn child, and Mr. Jones, individually, files this, his amended petition against the Respondents and alleges:

1. That this is a petition seeking a temporary injunction without notice and a permanent injunction against the Respondents from allowing an abortion to be performed upon the Respondent, Miss Smith.

2. That the Petitioner is over the age of twenty-one (21) and has been a resident of Orange County, Florida, for more than six (6) months.

3. That the Respondents are residents of Orange County, Florida.

4. That the Petitioner is the expectant natural father of the unborn child in which Miss Smith, a nineteen (19) year old minor, is the natural mother.

5. That the Petitioner specifically acknowledges his status as natural father, and this status has been acknowledged by the Respondent, Miss Smith.

6. That the Petitioner has repeatedly offered to marry the Respondent, Miss Smith, and to assume all of the obligations under the law attaching as a result of being the natural father of the unborn child currently in gestation within the womb of the Respondent, Miss Smith.

7. That the Petitioner has repeatedly acknowledged in the past and continues to acknowledge that he will assume all financial responsibility for prenatal and postnatal care of the child as well as the proper support of the child as if said child was born out of holy wedlock.

8. That in the event that the Respondent, Miss Smith, does not marry the Petitioner, then in that event, the Petitioner is willing and able to provide for all the necessary financial support and other duties of a father for said child.

9. That in the event that the Respondent, Miss Smith, does not desire to exercise her right as legal guardian of said child after the birth of said child and in the event that she does not marry the Petitioner, the Petitioner is well able to provide a home for the child in an atmosphere conducive to the best interests of the child.

10. That in the event that this Honorable Court or any other court of competent jurisdiction determines that the best interests of the child require that it be placed either in an adoptive home or a foster home that he would contribute and provide for any and all support so dictated by the Court.

11. That the natural father is willing and able to submit himself to the jurisdiction of this Court for

whatever rulings and orders it deems equitable to provide for the necessary financial assistance and support of the unborn child as well as the reasonable support of the natural mother in the event that the natural mother chooses to retain custody of said child after it is born.

12. That the mother's mental and physical health will not be endangered by bringing the child to term and allowing its natural birth.

13. That despite the representations of the Petitioner to the Respondent, the Respondent has scheduled herself to undergo abortive surgery in the offices of Arthur E. Corey, M.D., 1404 Kuhl Avenue, Orlando, Florida, at 12:00 noon on Friday, April 20, 1973. That the evidencing of the intent to go through with the abortion at the scheduled time is a manifestation by the natural mother of abandonment of the child and as such would deprive the child of its life.

14. That in the event that the abortion is performed either at the time indicated above or any other time, irreparable harm would ensue in that the unborn child would be deprived of life.

15. That due to the exigency of the circumstances as they exist at the present time and the nature of the relief sought, it is respectfully submitted that the statutory provision requiring a bond in an action seeking injunctive relief is not applicable.

WHEREFORE, your Petitioner prays:

(a) That this Honorable Court take jurisdiction of the parties and the subject matter of this petition.

(b) That the Court enter an order granting a temporary injunction against the Respondents from allowing an abortion to be performed.

(c) That the Court enter a permanent injunction forever precluding any party from allowing an abortion to be performed at any time.

(d) That the Court waive the necessity of posting a bond by the Petitiorer in seeking this injunctive relief.

(e) That the Court provide such other relief as to it may appear equitable and just.

DATED this 19th day of April, 1973.

/s/ Mr. Jones

Mr. Jones

STATE OF FLORIDA
COUNTY OF ORANGE } ss:

SWORN to and subscribed before me, this 23rd day of April, 1973.

ORAL AMENDMENT TO THE PETITION FILED IN OPEN COURT

MR. MULLER: Your Honor, at this time we would respectfully petition the Court to amend our petition in three respects in light of the fact that during the course of the proceedings the issues framed by the pleadings themseves, as well as the evidence, the indications by the Court, plus some motions filed by the respondent, that there are certain factors which have obviously gone on record as being salient issues here which we feel we would like to articulate a little more fully in our pleadings.

First of all, Your Honor, we would ask that the petition have an additional paragraph as follows: That the petitioner is being denied his constitutional rights as guaranteed under both the United States and Florida Constitutions as the natural father of an unborn child or alternatively a conceptus, if the abortion by the respondent is allowed to go through....

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THE COURT: I agree. The amendments will be allowed.

Amendments in Open Court, May 3, 1973, pages 71-72, 74, Transcript of Testimony (May 3, 1973).

APPENDIX E

PRE-TRIAL CONSIDERATIONS

The Court has given considerable thought to the issues presented by this case, especially in light of the recent Supreme Court cases, *Roe* and *Doe* and the general injunctive law. Due to the particular need of an early decision on this case, the Court feels it would be beneficial to advise the litigants of particular questions which immediately come to the Court's mind concerning the issues in this case. The Court realizes and expects that skilled counsel, as are present here, will have already prepared to present the facts and law in an orderly and legal framework which best supports their position and the ends of truth and justice under the law. However, the Court requests that these questions below be considered and argued in the context of the presentation of each litigant.

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7. Present a clear and separate expression of each legal theory on which Petitioner is basing his right to relief and also the theories that are akin to the relief sought but distinguished.

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APPENDIX F

IN THE CIRCUIT COURT
ORANGE COUNTY, FLORIDA

IN RE:

MR. JONES, as natural father
and next friend of _____
JONES, or, alternatively,
_____ SMITH, an unborn
human child, and MR. JONES,
individually,
Petitioner,

v.

CASE NO.
73-2770

MR. SMITH, as natural father
and next friend of MISS SMITH,
an unmarried minor, MISS SMITH,
an unmarried minor, individually
and ARTHUR E. COREY, M.D., P.A.,
Respondents.

FINAL JUDGMENT

This matter having come before the Court this 3rd day of May, 1973, for final hearing on Petitioner's request for a permanent injunction precluding the Respondent, Miss Smith, from obtaining an abortion and the issues having been framed by the Court's Pre-Trial Considerations, dated April 23, 1973, and the Petition as amended in open Court on May 4, 1973 and the Court having heard testimony and evidence presented in the case and having heard arguments of counsel for the parties and having considered the law as applied to the facts of the case, it is thereupon

CONSIDERED, ORDERED AND ADJUDGED as follows:

1. The temporary injunction entered by this Court's Order dated April 25, 1973 is hereby terminated.

2. The Petition for a Permanent Injunction precluding Respondents, Miss Smith, Mr. Smith and Arthur E. Corey, M.D., P.A. from obtaining or aiding in the obtainment of an abortion on Miss Smith is hereby denied.

DONE AND ORDERED in Chambers at Orlando, Florida this 4th day of May, 1973.

WILLIAM C. GRIDLEY
Circuit Judge

APPENDIX G

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

IN RE:

MR. JONES, etc.,
Petitioner,

vs.

MR. SMITH, etc., et al.,
Respondents.

CASE NO.: 73-2770

ASSIGNMENTS OF ERROR

The Petitioner, MR. JONES, by and through his undersigned attorneys, respectfully files these, his assignments of error intended to be relied upon in the Fourth District Court of Appeal for the State of Florida for reversal of the judgment entered in the above-styled cause. The assignments of error are:

1. That this Honorable Court erred in striking testimony of James V. Werba, M.D., since the unrebutted testimony showed that a fetus is a living human being from the moment of conception. As such, this human being should be granted all the rights and privileges of a person within the meaning of the United States Constitution.

2. That this Honorable Court erred in striking the testimony of James V. Werba, M.D., in that his unrebutted testimony conclusively showed that the natural mother's role in pregnancy is no more than that of a life support system such as an incubator. As such, the natural mother has no more right to the fetus than the natural father.

3. That this Honorable Court erred in rendering its decision based upon on implied contract theory since said theory was inapplicable to the issues as framed before the lower court.

4. That the lower court erred in finding that there was no implied contract between the parties.

5. That the lower court erred in refusing to rule upon the constitutionality of *Florida Statutes* 458.22(3)(a)(1972) on its face.

6. That the lower court erred in refusing to rule on the constitutionality of *Florida Statutes* 458.22(3)(a)(1972) as applied to the petitioner.

7. That the lower court erred in its ruling as a matter of law since the weight of the evidence conclusively showed that the Petitioner had a right to prevent the Respondent, MISS SMITH, from obtaining an abortion.

8. That the judgment was contrary to the law.

9. That the judgment was contrary to the weight of the evidence.

10. That the judgment was contrary to the weight of the law and the evidence.

11. That the lower court erred in denying Petitioner's motion for rehearing or alternative motion for amendment of judgment.

I HEREBY CERTIFY THAT a true copy of the foregoing has been furnished to Donald R. Corbett and Gladstone L. Kohloss, Attorneys for the Respondents, by hand delivery this 4th day of May, 1973.

MAIRS, WOOD, MULLER & BOROUGHS, P.A.

CHANDLER R. MULLER
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Winter Park, Florida 32789

MELVIN PEARLMAN
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Winter Park, Florida 32789
Attorneys for the Petitioner

APPENDIX H

"Rule 19. Considerations Governing Review on Certiorari.

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

   (a) Where a State Court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Rule 19(1) (a), Supreme Court Revised Rules (As Amended) (1972)

CERTIFICATE OF SERVICE

WE hereby certify that three printed copies each of the foregoing Petition for a Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida and Appendices has been furnished by hand delivery, this day of January, 1974, to Donald R. Corbett, 205 N. Rosalind Avenue, Orlando, Florida, and Gladstone Kohloss, 219 N. Magnolia Avenue, Orlando, Florida, counsel for the Respondents.

James F. Mairs

Chandler R. Muller

Melvin Pearlman